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No. 615

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

R. L. BRADFORD,

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R. L. Bradford,
In Person,
27 East 38th Street,
New York, N. Y.

INDEX

	PAGE
Opinion Below	1
Grounds on Which Jurisdiction is Involved	2
Questions Presented for Review	2
Constitutional Provisions Which the Case Involves	2
Statement of the Case	2
Reasons Relied on for Insurance of the Writ	4
Argument Amplifying the Reasons Relied Upon for Allowance of the Writ	6
Conclusion	9

Cases Cited

Chessman v. Teets, 354 U. S. 156	8
Curcio v. United States, 354 U. S. 118	5
In re Groban, 352 U. S. 330	6, 7, 8
Johnson v. Zerbst, 304 U. S. 458	4
Powell v. Alabama, 287 U. S. 45, 69	4

Statutes

United States Code:	
Title 28, Section 1254	2
Title 18, Section 1341	2
Federal Rules of Criminal Procedure:	
Rule 44	4

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To the Honorable Justices of the Supreme Court of the United States:

R. L. Bradford, petitioner herein, respectfully prays that a writ of certiorari issue to review the final decision of the United States Court of Appeals for the Second Circuit entered on November 4, 1959, rehearing denied November 30, 1959, affirming an order of the United States District Court for the Southern District of New York, denying petitioner's application for a writ of coram nobis.

Opinion Below

The opinion of the Court of Appeals has not been officially reported and will be found appended to the original certified record of the proceedings filed concurrently herewith.

Grounds on Which Jurisdiction is Invoked.

The judgment sought to be reviewed was filed and entered on November 2, 1959, and a petition for a rehearing was filed on November 17, 1959, and it was denied on November 30, 1959. Jurisdiction is conferred on this Court to review said judgment by Title 28, section 1254, United States Code.

Question Presented for Review

The question presented is:

"Does compelling an *accused*, as distinguished from a witness, to testify and give evidence against himself before a grand jury concerning matters charged in an indictment without counsel personally present during such examination constitute a violation of the sixth amendment?

Constitutional Provisions Which the Case Involves

SIXTH AMENDMENT: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Statement of the Case

On or about October 27, 1949, the grand jury of the Southern District of New York filed an indictment purporting to charge petitioner with the violation of section 1341, Title 18, United States Code.

On November 9, 1949, petitioner, then imprisoned in Federal Detention Headquarters, New York, N. Y., under the purported authority of said complaint and indictment, was forcibly taken against his will by the United States Marshal for the Southern District of New York, before

a grand jury of and in said district and into its grand jury room, and he was then and there directed and compelled by the United States Attorney for said district to testify and give evidence against himself as to matters charged in said complaint and indictment; and that petitioner was, contrary to, and in violation of, law, particularly questioned as to the whereabouts of certain books and records of a certain corporation, to wit, Business Research, Inc. of which said corporation petitioner was not then an officer, director, employee or stockholder; nor did he then have custody, control or possession of its said records (3a).

During said examination, appellant did not have the assistance of counsel personally present to advise him concerning his testimony, and his statutory and constitutional rights appertaining thereto.

Subsequently thereto, and on December 5, 1949, appellant, under the coercion of his court-appointed attorney who had never been admitted to practice law in any federal court, pleaded guilty, though innocent, to said indictment.

On December 12, 1949, appellant was sentenced to one year on two counts, and was given three years probation on the two remaining counts.

A full statement of the facts appears in appellant's Petition (p. 3a).

The stenographer's transcript of the grand jury inquisition is annexed to said Petition (p. 6a).

On or about July 7, 1958, petitioner applied to the United States District Court for a writ of error coram nobis upon the grounds that, as an *accused* and not a witness, he was compelled to testify and give evidence against himself before a grand jury of said district without counsel personally present thereat in violation of the sixth amendment.

On January 20, 1959, said application was denied.

Upon appeal, said order of denial was affirmed by the Court of Appeals for the Second Circuit.

Reasons Relied on for Issuance of the Writ

The sixth amendment to the constitution of the United States prescribes as follows:

> "In all criminal prosecutions, the *accused* shall enjoy the right . . . to have the assistance of counsel for his defense."

Rule 44 of the Federal Rules of Criminal Procedure provides as follows:

> "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel."

In *Powell* v. *Alabama*, 287 U. S. 45, 69, the court said that an accused "requires the guiding hand of counsel at every step of the proceedings against him."

Where the accused, as distinguished from a witness, is denied counsel at every stage of the proceedings against him, *the trial court loses jurisdiction*, and all proceedings subsequent thereto, including the judgment, are *void*.

The leading case on loss of jurisdiction where counsel is denied is *Johnson* v. *Zerbst*, 304 U. S. 458, where the court said:

> "He (the accused) requires the guiding hand of counsel at every stage of the proceedings against him. The sixth amendment withholds from federal courts in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (463)

"The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and *the guaranty would be nullified by a determination that the accused's ignorant failure to claim his rights removes the protection of the constitution.* . . ." (465)

"Since the sixth amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. . . ." (467)

"A court's jurisdiction at the beginning of a trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the sixth amendment requires—by providing counsel for one who has not intelligently waived this constitutional guaranty, and whose life and liberty is at stake. If this requirement of the sixth amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may be released by habeas corpus." (468)

Dragging petitioner, then imprisoned, forcibly before a grand jury, after charge, and compelling him to testify and give evidence against himself so that the prosecution can obtain incriminating admissions; or to ascertain the whereabouts of corporate records which it may not legally do (*Curcio v. United States*, 354 U. S. 118), is a stage in the proceedings against him; and, indeed, a very important stage.

It may seem incredible that such a practice could exist in a country that pretends to a civilized system of jurisprudence, but such are the admitted facts here.

Petitioner, not a *witness*, but an *accused*, was entitled to counsel personally present at that stage of the proceedings where he was examined as to matters charged; and the failure to accord him such right, rendered all subsequent proceedings void under the sixth amendment.

The right to counsel at such time has been firmly established by the Supreme Court in *In re Groban*, 352 U. S. 330, where the court said:

> "The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. *When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense.* Until then his protection is the privilege against self-incrimination." (p. 332)

Argument Amplifying the Reasons Relied Upon for Allowance of the Writ

This Court in the *Groban* case, *supra*, explicitly held that an *accused*, as distinguished from a *witness*, has the right under the sixth amendment, to the assistance of counsel personally present while being compelled to testify and give evidence against himself before a grand jury, or other inquisitorial body.

It is usually assumed that the lower federal courts are bound to follow the decisions of this Court, particularly as to its declarations of fundamental constitutional rights. In this case, the Court of Appeals completely disregarded the rule set forth by this Court in the *Groban* case.

Furthermore, it gave no reason whatsoever for doing so. It affirmed the order of the district court "on the opinion of Judge Bryan."

Judge Bryan denied the application upon the basis of a decision of Judge Weinfeld reported in 122 F. Supp. 915 (1954).

Judge Weinfeld's decision has no application whatsoever to the present grounds for the reason that the only issue before him was whether compelling petitioner to testify and give evidence against himself violated the *fifth* amendment.

Judge Bryan's quotations from Judge Weinfeld's opinion show that conclusively (24a).

Judge Bryan also quotes Judge Weinfeld's opinion to the effect that petitioner had counsel at every stage of the proceedings (23a). Judge Weinfeld does not say that petitioner had counsel personally present in the grand jury room during the inquisition.

In any event, such statement would be contrary to the indisputable facts of the record for the stenographic transcript shows that such was not the case (p. 6a).

This Judge Bryan admits (25a).

Furthermore, the *Groban* case, upon which petitioner based his instant application to the district court, was not decided until February 24, 1957, so the present grounds could not have been raised before Judge Weinfeld in 1954.

An examination of Judge Bryan's opinion shows that he did not meet the issue squarely, but resorted to obvious irrelevancies.

He based his decision apparently upon prior applications for relief upon other and different grounds that have nothing to do with the present application (25a) (*Chessman* v. *Teets*, 354 U. S. 156); and his only reference to the *Groban* case was that it did not change the law. It was never claimed that *Groban* changed any law. It was claimed that, through it, this Court held that an accused while testifying before a grand jury under compulsion had the right to have the assistance of counsel personally present thereat.

What Judge Bryan held in effect was that Judge Weinfeld's prior decision on another point overruled the *Groban* case subsequently decided; and that, in any event, the district courts could disregard it with impunity.

In this case, the Court of Appeals "has decided a federal question in conflict with applicable decisions of this Court."

It is respectfully submitted that if the lower courts do not follow the mandates of this Court; particularly in regard to fundamental constitutional rights, the administration of justice in the federal courts will fail completely.

There will be one rule for one defendant, and a different rule for another depending solely upon whether a particular court considers itself bound by the *Groban* case, or not.

It is respectfully submitted that this Court granted certiorari to *Groban*, and that the present case, originating in a federal, not a state, court, presents issues of equal importance.

It may be observed that the present trend of both legislation and judicial decisions is to permit presence of counsel during examinations, even where those testifying are not accused, or even suspected, such as Congressional Committee investigations. To deny presence of counsel in such cases is justly regarded with horror as a species of tyranny. How much more important is it that an *accused* have the same right.

Secret inquisitions of an accused can have no legitimate purpose, but are instituted solely for the purpose of extracting evidence to be used later upon a trial. Such practice is unconscionable for the accused sits there alone surrounded by twenty-four grand jurors and one or more prosecutors to be badgered with questions designed to elicit answers that incriminate. It is just as important that the accused have the assistance of counsel in such situations as he admittedly has such right during his trial.

The sixth amendment becomes a dead letter if the lower courts can wilfully deny the right to counsel under such circumstances knowing that, because of the pressure of work, the probabilities of a review by this Court are slight.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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Petitioner in Person,
27 East 38th St.,
New York, N. Y.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	5

CITATIONS

Case:

In re Groban, 352 U.S. 330 5

Statute and rule:

28 U.S.C. 2255 2
Rule 6(d), F. R. Crim. P. 5

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 47-48) has not yet been reported. The opinion of the district court appears at pages 22-26 of the record.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1959. A petition for rehearing was denied on November 30, 1959. The petition for a writ of certiorari was filed on December 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a judgment on a plea of guilty should have been voided on a writ of error *coram nobis*, after sentence had been fully served, on the ground that petitioner did not have counsel when he appeared before the grand jury, while under an indictment, pursuant to a subpoena to produce corporate books.

STATEMENT

In December, 1949, during trial in the United States District Court for the Southern District of New York, petitioner pleaded guilty to four counts charging mail fraud violations. He was sentenced to concurrent terms of imprisonment of one year and one day on counts 1 and 2 and to three years' probation on counts 3 and 4 to commence upon the expiration of his term of imprisonment. Petitioner's sentences have been fully served, but petitioner has, nevertheless, instituted numerous proceedings seeking to have the judgment set aside (see R. 47).

The contention raised in the instant proceeding, that petitioner had not been represented by counsel when summoned before a grand jury to produce corporate books while he was under indictment, had been raised in a motion to vacate sentence under 28 U.S.C. 2255, and had been the subject of a hearing before Judge Kaufman. In denying that motion, the court found that petitioner had consulted counsel prior to appearing before the grand jury; that petitioner had been fully apprised of his privilege against self-incrimination; that he had been summoned only as

an officer of the corporation to produce certain specific books and records; and that when petitioner objected to testifying as to the location of the corporate records on the ground of self-incrimination he was immediately excused from testifying (R. 36-46). An appeal in that proceeding was dismissed for lack of jurisdiction since petitioner was not in custody, 194 F. 2d 197 (C.A. 2), and certiorari was denied by this Court, 343 U.S. 979.

The contention that petitioner had improperly been summoned before the grand jury as a defendant was made in an application for a writ of error *coram nobis* on which petitioner was accorded a hearing before Judge Weinfeld in 1954. The decision denying that motion is reported at 122 F. Supp. 915, appeal dismissed for want of prosecution.

The present proceeding instituted in July, 1958, alleged that petitioner's appearance before the grand jury vitiated the judgment because he did not have counsel personally present at the time he gave testimony (R. 3-6). The district court overruled the motion, relying largely on the prior opinions, but pointing out also that petitioner's contentions would not in any event serve to vitiate a judgment entered on a plea of guilty knowingly made in the midst of trial (R. 22-26). The court of appeals affirmed on the opinion of the district court (R. 47-48).

In brief, the facts as they appear from the prior opinions, and the record in this case, are that petitioner and his corporation, Business Research Inc., were indicted for mail fraud on October 27, 1949. On October 31, 1949, petitioner, who was represented

by counsel, entered a plea of not guilty on behalf of himself and the corporation. Thereafter he was served with a subpoena duces tecum to produce books and records of the corporate defendant. His testimony before the grand jury is included in the present record (R. 6-10). He was advised of his privilege against self-incrimination and stated that he had consulted with his counsel before coming before the grand jury. He was then asked various questions as to the whereabouts of the books of the corporation and as to the status of various persons thought to be associated with it who might know where the books would be located. Petitioner objected to the hearing on the ground that he was already under indictment but did answer some of the questions, stating that he did not know where the books were. He finally claimed the privilege against self-incrimination and was excused.

On December 2, 1949, the grand jury returned an indictment against petitioner and the corporate defendant which superceded the indictment of October 27, with differences only as to matters of form (see 122 F. Supp. at 919). During the trial, petitioner changed his plea to guilty, after the trial court examined petitioner to make certain he understood the nature of his plea (see R. 11-12).

ARGUMENT

Petitioner's latest attack on his conviction presents no grounds which would justify vacation of the judgment entered on his voluntary plea of guilty. He was not entitled to have counsel at the time he actu-

ally testified before the grand jury since counsel is not one of the persons whose presence is authorized under Rule 6(d), F. R. Crim. P.[1] Petitioner, moreover, was summoned to produce books and records of the corporation. He was advised of his right to claim the privilege and he had previously consulted with his attorney. His claim of privilege was in fact honored. Thus there is no merit in his attack on the proceedings before the grand jury. And, even if there were, this would present no basis for vacating the judgment since petitioner, with full knowledge of the facts as to his appearance, nevertheless pleaded guilty to the indictment returned subsequent to his appearance before the grand jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JANUARY 1960.

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[1] Petitioner's reliance on *In re Groban*, 352 U.S. 330, is misplaced. That decision recognizes that a witness before a grand jury cannot insist on being represented by counsel and that the protection of the witness lies in the privilege against self-incrimination. See 352 U.S. at 333.

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